HP Projects Sdn Bhd v Investprop (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL W–04–29 OF 2001
ABDUL MALEK AHMAD PCA, TENGKU BAHARUDIN SHAH JCA AND JAMES FOONG J

27 JULY 2005

Landlord and Tenant — Determination — Termination of contractual tenancy — Tenancy provided for termination by re-entry — Whether filing and service of summons for vacant possession sufficient to constitute re-entry to terminate tenancy

Landlord and Tenant — Determination — Waiver — Whether acceptance of rental waived rights to terminate

The respondent, who was the landlord of a double storey building ('the said premises'), had rented to the appellant the said premises for a sum of RM5,750 per month for a period of three years. According to the respondent, the appellant had breached a term of this tenancy agreement, therefore, the respondent through its solicitors, on 10 May 1994, gave notice in writing to the appellant that the tenancy agreement would be terminated with effect from date thereof and demanded vacant possession of the said premises be surrendered to the respondent forthwith. When the appellant failed to vacate the said premises, the respondent commenced this action in the Sessions Court on 24 November 1994. The respondent also took out an application for summary judgment for vacant possession of the said premises and for double rental from 1 July 1994 till date of vacant possession. The learned Sessions Court Judge allowed this application. Dissatisfied, the appellant appealed to the High Court. The High Court dismissed the appeal; thus this appeal.

The appellant submitted two grounds of appeal, ie: (1) the respondent did not comply with a pre-condition stipulated in cl 7(b) of the tenancy agreement which provided that the tenancy agreement shall only be terminated with a re-entry onto the said premises by the landlord. Instead, the respondent relied on its solicitors' letter of 10 May 1994 to effect the termination; and (2) the respondent waived its rights to terminate the tenancy agreement when the respondent accepted rental payment from the appellant as late as 12 November 1994, the date after the purported termination.

Held, dismissing the appeal with costs:

(1) Though the respondent did not physically re-enter the said premises, but by their filing this action and serving the Summons on the appellant on 14 December 1994, this was sufficient to constitute a re-entry into the said premises under cl 7 (b) of the tenancy agreement. Therefore, the tenancy agreement had been terminated as of 14 December 1994 (see para 12).

(2) Since the date of lawful termination was 14 December 1994, there was no waiver on the part of the respondent in accepting such rental up to 12 November 1994 because the tenancy was still subsisting at that material time. The respondent had every right during the subsistence of the tenancy to collect rental (see para 14).

[**Bahasa Malaysia summary**

Responden, yang merupakan tuan rumah kepada sebuah rumah dua tingkat ('premis tersebut') telah menyewakan premis tersebut kepada perayu pada kadar RM5,750 sebulan bagi tempoh tiga tahun. Menurut responden, perayu telah melanggar satu terma perjanjian sewaan, dan oleh itu, responden, melalui peguamcaranya, pada 10 Mei 1994, telah memberi notis secara bertulis kepada perayu bahawa perjanjian sewaan tersebut akan ditamatkan berkuatkuasa daripada tarikh tersebut dan menuntut milikan kosong premis tersebut diserahkan kepada responden dengan serta-merta. Apabila perayu gagal untuk mengosongkan premis tersebut, responden telah memulakan tindakan ini dalam mahkamah sesyen pada 24 November 1994. Responden juga membuat permohonan untuk penghakiman terus bagi milikan kosong premis tersebut dan bagi sewa berganda daripada 1 Julai 1994 sehingga tarikh milikan kosong. Hakim mahkamah sesyen yang arif telah membenarkan permohonan ini. Kerana tidak puas hati, perayu telah merayu ke Mahkamah Tinggi. Mahkamah Tinggi telah menolak rayuan tersebut; maka rayuan ini.

Perayu telah mengemukakan dua alasan rayuan, ie: (1) reponden tidak memenuhi satu pra-syarat yang terkandung dalam klausa 7(b) dalam perjanjian sewaan tersebut yang menyatakan bahawa perjanjian sewaan itu hanya akan ditamatkan dengan kemasukan semula ke atas premis tersebut oleh pemiliknya. Sebaliknya, responden telah bergantung kepada surat peguamcaranya yang bertarikh 10Mei 1994 bagi menguatkuasakan penamatan tersebut; dan (2) responden telah mengetepikan haknya untuk menamatkan perjanjian itu apabila responden menerima bayaran sewa daripada perayu selewat 12 November 1994, tarikh selepas penamatan yang dikatakan.

Diputuskan, menolak rayuan dengan kos:

(1) Walaupun responden tidak secara fizikal memasuki semula premis tersebut, tetapi dengan memfailkan tindakan ini dan menyerahkan saman ke atas perayu pada 14 Disember 1994, ini adalah mencukupi untuk terjumlah kepada kemasukan semula ke atas premis tersebut di bawah klausa 7(b) perjanjian sewaan. Oleh itu, perjanjian sewaan tersebut telah ditamatkan pada 14 Disember 1994 (lihat perenggan 12).

(2) Memandangkan tarikh sah penamatan adalah 14 Disember 1994, tiada pengenepian oleh responden dalam menerima sewa itu pada 12 November 1994 kerana sewa tersebut masih lagi berterusan pada masa tersebut.

Responden mempunyai hak semasa sewa berterusan untuk memungut sewa (lihat perenggan 14).]

Notes

For cases on determination generally, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 850–1012.
For cases on waiver, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1007–1010.

Cases referred to

Canas Property Co Ltd v KL Television Services Ltd [1970] 2 All ER 795 (refd)
Jones v Carter (1846) 15 M & W 1040 (718) (refd)
Serjeant v Nash, Field & Co & Anor [1903] 2 KB 304 (refd)
Woolwich Equitable Building Society v Preston [1938] Ch 129 (refd)

Legislation referred to

Specific Relief Act 1950 s 8
Subordinate Courts Rules 1980 O 26A

Appeal from: Civil Appeal No R1–12–53 of 1996 (High Court, Kuala Lumpur)

BE Teh (Teh & Associates) for the appellant.
TM Eng (Wan Shaifuddin bin Ab Wahid with him) (Jal & Lim) for the respondent.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] In this appeal the respondent, who was the landlord of a double storey building known as Lot 741, Jalan Sultan Ismail, Kuala Lumpur ('the said premises'), had rented to the appellant the said premises for a sum of RM5,750 per month for a period of three years commencing from 1 October 1992. This tenancy is evidenced by a written agreement dated 26 April 1993. According to the respondent, the appellant had breached a term of this tenancy agreement by failing to secure approval from the relevant authorities to renovate the said premises into a restaurant and to operate as such. This warranted the respondent to terminate the tenancy and to reclaim possession of the said premises. Toactivate this, the respondent, through its solicitors, on 10 May 1994, gave notice in writing to the appellant that the tenancy agreement would be terminated with effect from date thereof and that vacant possession of the said premises be surrendered to the respondent forthwith. This letter added:

> … unless you quit and deliver vacant possession of the above captioned premises to our client on or before 30 June 1994, you shall be liable to pay double rental and /or mesne profits at RM11,500 per month calculated from 1 July 1994 till date of actual delivery of vacant possession ....

[2] When the appellant failed to vacate the said premises, the respondent commenced this action in the sessions court on 24 November 1994. The prayers listed in the statement of claim are:

(a) an order that the appellant and all persons claiming through and/or under them vacate and deliver vacant possession of the said premises to the respondent;

(b) general damages;

(c) interest thereon at the rate of 8% per annum from the date hereof to the date of full payment;

(d) double rental at the rate of RM11,500 a month from 1 July 1994 until date of actual delivery;

(e) an indemnity and/or contribution to the extent of 100% pursuant to claims by the authorities for the demolition of unlawful structures constructed on the said premises and the use of the said premises as a restaurant;

(f) interest thereon at the rate of 8% per annum from 1 July 1994 to the date of full settlement on para (d) herein and;

(g) costs of this action.

[3] Subsequent to the filing of this action, the respondent took out an application for summary judgment under O 26A of the Subordinate Courts Rules 1980 for vacant possession of the said premises and for double rental of RM11,500 per month from 1 July 1994 till date of vacant possession. The learned sessions court Judge allowed this application.

[4] Dissatisfied, the appellant appealed to the High Court. The High Court dismissed the appeal; thus this appeal before us.

APPELLANT'S CONTENTIONS

[5] Mr Teh, counsel for the appellant, informed this court that he is limiting his appeal to only two grounds to support his contention that the learned High Court judge has erred in upholding the sessions court's ruling against the appellant. These are:

(1) The respondent did not comply with a pre-condition stipulated in cl 7(b) of the tenancy agreement which says that the tenancy agreement shall only be terminated in the event of a breach by the tenant with a re-entry onto the said premises by the landlord. Instead, the respondent relied on its solicitors' letter of 10 May 1994 to effect the termination.

(2) The respondent has waved its rights to terminate the tenancy agreement when the respondent accepted rental payment from the appellant as late as 12 November 1994 the date after the purported termination.

SUBSEQUENT EVENTS

[6] Before we proceed to analyse the contentions of the appellant against the contrary arguments of the respondent's counsel, it is pertinent to note the following events had taken place subsequent or consequential to the decisions of the sessions court and the High Court:

(1) The appellant has vacated the said premises on 10.7.1997.

(2) The appellant has paid to the respondent a sum of RM417,709,68 being double rental for the said premises calculated from 1 July 1994 till 10 July 1997 (RM11,500 x 36 months and 10 days).

FIRST ISSUE: TERMINATION

[7] There is no doubt that cl 7(b) of the tenancy agreement specifies that the respondent, as landlord, 'shall be at liberty to re-enter upon the said premises or any part thereof in the name of the whole and thereupon this agreement shall absolutely determine but without prejudice to any remedy or right of action of the landlord in respect of any breach of the terms conditions or stipulations herein contained.' And it is obvious from the facts disclosed that the respondent did not abide by this procedure to terminate the said tenancy agreement. The respondent only relied on its solicitors' letter of 10May 1994 to effect termination.

[8] Realising this defect, respondent's counsel, Ms Eng, first attempted to convince us that the first contention of the appellant is not pleaded in the statement of defence. But this is not correct. Paragraph 12 of the statement of defence declares that the 'termination by the plaintiff of the tenancy is wrongfuf. Though this may be wanting in particulars but in our view, it is sufficient to justify that this issue has been pleaded.

[9] Ms Eng then argued that aside from the mode of termination as discussed, the respondent, as landlord, has other right or remedy to terminate the tenancy agreement and this was done by way of the letter of termination of 10 May 1994. This alternative right or remedy is provided by cl 7(b) where the last four lines of this clause state: 'but without prejudice to any remedy or right of action of the landlord in respect of any breach of the terms and conditions or stipulations herein contained'.

[10] We are not attracted by this argument. We are of the view that this phrase 'but without prejudice to any remedy or right of action of the landlord in respect of any breach of the terms and conditions or stipulations herein contained' only permits the landlord to commence an action or institute a remedy against the tenant in respect of a breach of the tenancy agreement other than for termination of the tenancy. The reason is because the right to terminate as a result of a breach of the said agreement is already provided and catered for immediately antecedent to this phrase. Thus this additional remedy

or right must be limited and restricted to remedy or right of action of the landlord for a breach committed by the tenant other than for termination of the tenancy agreement.

[11] Though we are in agreement with the contention of the appellant that termination of the tenancy agreement ought to be by way of a re-entry as provided by cl 7(b) of the tenancy agreement, but there are times when such mode of termination, which often involves some form of physical exertion, may not be desirable, particularly where animosity exists between the landlord and tenant. And if attempt to re-enter is met with a refusal from the tenant, the landlord may be subjected to a claim by the tenant under s 8 of the Specific Relief Act 1950 which states that: 'If any person is disposed without his consent of immovable property otherwise than in due course of the law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit'. To overcome such dubious and dangerous course, the best alternative is by filing of an action against the tenant claiming possession of the demised premises. Such action is accepted as being equivalent to a physical re-entry — see *Jones v Carter* (1846) 15 M & W 1040 (718); *Serjeant v Nash, Field & Co & Anor* [1903] 2 KB 304 and *Woolwich Equitable Building Society v Preston* [1938] Ch 129. As to when termination is considered to have taken place under such circumstances, Lord Denning MR in *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 All ER 795, has declared that it should be the time of service of the writ or summons. The reason is simple: It is the time when the tenant is considered to be aware of the forfeiture of the tenancy. We find all these propositions rational and shall apply them to the facts of this instant case.

[12] Though the respondent did not physically re-enter the said premises, but by their filing this action and serving the Summons on the appellant on 14 December 1994, we consider them sufficient to constitute a re-entry into the said premises under cl 7 (b) of the tenancy agreement. We thus find that the tenancy agreement has been terminated as of 14 December 1994.

[13] With a termination of the tenancy agreement properly constituted, we are unable to accept the appellant's contention that the learned High Court judge has erred in upholding the decision of the sessions court. We wish to reiterate that the tenancy agreement has been terminated; the only error in the High Court's decision is on the date of termination, not there being no lawful termination.

WAIVER

[14] We now move onto the next issue of waiver. We are of the view that this claim of the appellant should be considered in relation to the date of the termination of the tenancy agreement. If such rental was accepted by the respondent subsequent to the date of termination then there may be merits

in the appellant's argument; otherwise it should be rejected. The reason is simple: If it was before then there is no issue since the tenancy was still subsisting. If was after, then such act may amount to a waiver on the part of the respondent, as landlord, to terminate the tenancy. In this case, since the date of lawful termination is 14 December 1994, there is no waiver on the part of the respondent in accepting such rental as the tenancy was still subsisting at that material time. The respondent has every right during the subsistence of the tenancy to collect rental.

MENSE PROFITS

[15] Mr Teh has complained that the respondent has over charged the appellant on mense profits. With the effective date of termination of the tenancy agreement fixed at 14 December 1994, it is our view that the respondent should only be liable to pay mense profits from the 14 December 1994 till the time when the appellant vacated the said premises on 10 July 1997. Prior to this date, the respondent can only charge rental for the said premises on the basis that the tenancy is still subsisting. But after this date, as the tenancy agreement has terminated, the appellant is liable to pay mense profits for the period of overstay.

CONCLUSION

[16] For the reasons aforesaid, we dismiss this appeal with costs. We uphold the High Court's decision affirming the sessions court order for summary judgment under O 26A of the Subordinate Courts Rules 1980 except for the calculation of mense profits, which should commence from 14 December 1994 till 10 July 1997 at RM11,500 per month with interest of 8% thereon and not from 10 May 1994.

[17] We also order that the deposit is to go to the respondent towards taxed costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee